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Attention: Board of Patent Appeals and Interferences, Commissioner for Patents, Washington, D.C., 20231.

Date: August 15, 2002

Signature: Rita Carr

Rita Carr

Attorney Docket No.:
58569-P001US-10007125
(PATENT)

9/4/02
46 Appeal
Brief
(3C)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Rodney L. Dockery, et al.

Application No.: 08/813,852

Group Art Unit: 2167

Filed: March 7, 1997

Examiner: F. Bartuska

For: SYSTEM AND METHOD FOR PROMOTING STORES AND PRODUCTS

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APPELLANT'S BRIEF

Attention: Board of Patent Appeals and Interferences
Commissioner for Patents
Washington, DC 20231

Dear Sir:

This brief is in furtherance of the Notice of Appeal, dated June 19, 2002 and received by the United States Patent Office on June 24, 2002.

The fees required under §1.17(f) and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief is transmitted in triplicate.

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This brief contains items under the following headings as required by 37 C.F.R. §1.192 and M.P.E.P. §1206:

- I. Real Party In Interest
- II. Related Appeals and Interferences
- III. Status of Claims
 - A. Total number of claims in application
 - B. Current status of claims
 - C. Claims on appeal
- IV. Status of Amendments
- V. Summary of Invention
- VI. Issues
- VII. Grouping of Claims
- VIII. Arguments Regarding Patentability of the Claims
 - A. The Claim Of Group 1 (Claim 18)
 - 1. The Declaration Under 37 C.F.R. § 1.132 Properly Establishes Objective Evidence Of Non-Obviousness
 - 2. Proper Motivation Under 35 U.S.C. § 103 Has Not Been Established With Respect to the Proffered Combination of *Shedd* and *Bullard*
 - 3. The Rejections Under 35 U.S.C. § 103 Do Not Meet All Elements of The Claims
 - B. The Claim of Group 2 (Claim 19)
 - C. The Claim of Group 3 (Claim 20)
 - D. The Claim of Group 4 (Claim 21)
 - E. The Claim of Group 5 (Claim 22)
 - F. The Claim of Group 6 (Claim 23)
 - G. The Claim of Group 7 (Claim 25)
- IX. Claims Involved in the Appeal
- X. Conclusion
- Appendix A Claims

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I. REAL PARTY IN INTEREST

The real party in interest in this appeal is Dockery House Publishing, Inc., a Texas corporation having its principal place of business in Dallas, Texas.

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. STATUS OF CLAIMS

A. Total Number of Claims in Application

There are 14 claims pending in the application which are identified as claims 1, 4, 10, 17, 18-23, and 25-28.

B. Current Status of Claims

1. Claims pending: 1, 4, 10, 17, 18-23, and 25-28
2. Claims canceled: 2, 3, 5-9, 11-16, and 24
3. Claims withdrawn from consideration but not canceled: 1, 4, 10, 17, and 26-28
4. Claims allowed: NONE
5. Claims rejected: 18-23 and 25
6. Claims objected to: NONE

C. Claims On Appeal

The claims on appeal are claims 18-23 and 25.

IV. STATUS OF AMENDMENTS

Claims 1-16 were originally presented in the application as filed March 7, 1997. In response to an Office Action mailed June 18, 1998 rejecting claims 1-16, Appellant submitted an Amendment dated December 16, 1998 which was received by the United States Patent Office on December 21, 1998. The Amendment, which was entered by the Appellee, presented arguments as to the patentability of all claims as well as amendments to claims 1, 5, and 11. In response to a final Office Action mailed March 5, 1999 rejecting claims 1-16, Appellant submitted an Amendment After Final Rejection dated May 24, 1999 which was received by the United States Patent Office on May 18, 1999. The Amendment After Final Rejection, which was not entered by the Appellee, presented arguments as to the patentability of all claims as well as amendments to claims 1, 4, and 10 and canceling claims 2, 3, 5-9, and 11-16.

In response to an Advisory Action mailed June 7, 1999 stating that Appellee would not enter the previous Amendment, Appellant submitted a Request for Continued Prosecution Application accompanied by a Preliminary Amendment which was filed with the United States Patent Office on September 3, 1999. The Preliminary Amendment, which was entered by Appellee, presented arguments as to the patentability of all claims as well as amendments to claims 1, 4, and 10, canceling claims 2, 3, 5-9, and 11-16, and submitting new claim 17. In

response to an Office action mailed October 22, 1999 rejecting the then pending claims (claims 1, 4, 10, and 17), Appellant submitted an Amendment dated March 21, 2000 which was received by the United States Patent Office April 6, 2000. The Amendment, which was entered by the Appellee, presented arguments as to the patentability of all claims as well as submitting new claims 18-28. In response to a final Office Action mailed June 7, 2000 rejecting claims 1, 4, 10, 17, and 26-28 and withdrawing from consideration claims 18-25, Appellant filed a Response After Final Rejection with the United States Patent Office August 7, 2000. The Response After Final Rejection presented arguments as to the patentability of claims 1, 4, 10, 17, and 26-28 supported by a Declaration of Caleb J. Pirtle Providing Evidence of Commercial Success Under 37 C.F.R. § 1.132.

In response to an Advisory Action mailed August 21, 2000, Appellant submitted a Request for Continued Prosecution Application which was filed with the United States Patent Office on December 5, 2000. In response to a Restriction Requirement mailed January 12, 2001 restricting claims 1, 4, 10, 17, and 26-28 to a first group and claims 18-25 to a second group, Appellant submitted an Election in Response to Restriction Requirement dated February 5, 2001 which was received by the United States Patent Office February 12, 2001. The Election in Response to Restriction Requirement elected claims 18-25 for further prosecution. In response to an Office Action mailed March 15, 2001 rejecting claims 18-25 and withdrawing claims 1, 4, 10, 17, and 26-28 from consideration, Appellant filed an Amendment dated May 27, 2001 which was received by the United States Patent Office June 14, 2001. The Amendment, which was entered by the Appellee, presented arguments as to the patentability of claims 18-25 as well as amendments to claim 18. In response to a final Office Action mailed July 30, 2001 rejecting claims 18-25 and continuing to withdraw claims 1, 4, 10, 17, and 26-28 from consideration, Appellant submitted an Amendment After Final Rejection dated December 31, 2001 which was received by the United States Patent Office on January 18, 2002. The Amendment After Final Rejection, which was not entered by the Appellee, presented arguments as to the patentability of claims 18-23 and 25 as well as amendments to claim 18 and canceling claim 24.

In response to an Advisory Action mailed January 25, 2002 stating that Appellee would not enter the previous Amendment, Appellant submitted a Request for Continued Examination with an Amendment Accompanying Request for Continued Examination Under 37 C.F.R. 1.114 which was filed with the United States Patent Office on March 28, 2002.

The Amendment Accompanying Request for Continued Examination Under 37 C.F.R. 1.114, which was entered by Appellee, presented arguments as to the patentability of claims 18-23 and 25, supported by a second Declaration of Caleb J. Pirtle Providing Evidence of Commercial Success Under 37 C.F.R. § 1.132, as well as amendments to claim 18 and canceling claim 24. In response to an Office Action mailed April 25, 2002 rejecting claims 18-23 and 25 and continuing to withdraw claims 1, 4, 10, 17, and 26-28 from consideration, Appellant submitted a Notice of Appeal dated June 19, 2002 which was received by the United States Patent Office June 24, 2002.

The claims listed in the Appendix reflect the claims as amended by the Amendment Accompanying Request for Continued Examination Under 37 C.F.R. 1.114 dated March 28, 2002. Appellant appeals the rejections set forth in the Office Action, mailed April 25, 2002.

V. SUMMARY OF INVENTION

Embodiments of the present invention provide magazines (330, 332, and 334 of Figure 3) for promoting the purchase of specific products, see the specification at page 11, line 15, through page 12, line 2. The magazines may be disposed at particular locations (28 of Figure 1) throughout a store for appropriation by customers, see the specification at page 14, line 28, through page 15, line 1. Moreover, the magazines may be unique or specific to a particular store, such as where articles containing specific brand information is commissioned by a particular store or where the name of a specific store appears on the cover of the magazine, see the specification at page 13, lines 1-9, and page 14, lines 9-11.

According to preferred embodiments, the promotional magazines include general interest articles with references to products to be promoted, see the specification at page 11, line 24, through page 12, line 2. Additionally, the promotional magazines may include coupons for some or all of the products to be promoted which are keyed to a corresponding general interest article, see the specification at page 14, lines 4-9.

VI. ISSUES

The issues in the present appeal are:

A) Whether the objective evidence of nonobviousness has been properly considered;

B) Whether proper motivation to combine references has been provided with respect to the 35 U.S.C. § 103 rejections of record; and

C) Whether the 35 U.S.C. § 103 rejections of record properly meet all elements of the claims.

VII. GROUPING OF CLAIMS

The claims do not stand or fall as a group. For purposes of this appeal brief only, and without conceding the teachings of any applied reference, the claims have been grouped as indicated below:

<u>Group</u>	<u>Claim(s)</u>
1.	18
2.	19
3.	20
4.	21
5.	22
6.	23
7.	25

In Section VIII below, Appellant has included arguments supporting the separate patentability of each claim group as required by M.P.E.P. § 1206.

VIII. ARGUMENTS REGARDING PATENTABILITY OF THE CLAIMS

Claims 18, 22, and 25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Shedd, patent number 2,215,163 (hereinafter *Shedd*), in view of Bullard, Jr., patent number 4,968,061 (hereinafter *Bullard*). Claims 19-21 and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over *Shedd* in view of *Bullard* and further in view of Lamphere et al., patent number 5,127,674 (hereinafter *Lamphere*).

To establish a *prima facie* case of obviousness, three basic criteria must be met, see M.P.E.P. § 2143. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. Without conceding the second criteria, Appellant

respectfully asserts that the references lack proper motivation to combine in addition to lacking all the claim limitations.

A. The Claim Of Group 1 (Claim 18)

1. The Declaration Under 37 C.F.R. § 1.132 Properly Establishes 1 Objective Evidence Of Non-Obviousness

Appellant submitted a second Declaration of Caleb J. Pirtle Providing Evidence of Commercial Success executed March 8, 2002 with the Amendment Accompanying Request for Continued Examination dated March 28, 2002. Appellant supplemented this second Declaration of Caleb J. Pirtle with a Supplemental Declaration of Caleb J. Pirtle Providing Evidence of Commercial Success executed April 1, 2002.

The second Declaration of Caleb J. Pirtle and Supplemental Declaration of Caleb J. Pirtle provide objective evidence of nonobviousness of the invention by showing commercial success attributable to the claimed invention. Specifically, Mr. Pirtle sets forth in the second Declaration of Caleb J. Pirtle that it is his belief that Dockery House, the assignee of the present application, has been able to obtain a large share of a mature promotional magazine market due to their providing a magazine containing a plurality of general interest articles, wherein at least one of the articles makes reference to an identified product including specific brand information pertaining thereto, with coupons keyed to the articles containing brand specific products.

In support of his statements in the second Declaration of Caleb J. Pirtle, Mr. Pirtle included a letter from a customer of Dockery House (Sally Beauty Company, Inc.). The letter states that Sally Beauty Company believes their increased coupon redemption rate to be the result of the Dockery House promotional magazine's use of general interest articles incorporating a product and having coupons therewith. Therefore, Sally Beauty Company continues to purchase the Dockery House promotional magazines to obtain the benefits of the unique promotional technique which is the subject of the present application for patent.

As further examples of Dockery House customer feedback supporting his statements in the second Declaration of Caleb J. Pirtle, Mr. Pirtle included several letters from customers of Dockery House (Lifestyle Vacation Incentives, Consumer Solutions, and FirstUp, Inc.) with the Supplemental Declaration of Caleb J. Pirtle. These letters further support the conclusion that Dockery House customers purchase the Dockery House promotional

magazines to obtain the benefits of the unique promotional technique which is the subject of the present application. For example, the letter from Lifestyle Vacation Incentives states that they are moving to the Dockery House promotional magazines “to take advantage of the unique way in which Dockery House Publishing provides a promotional magazine in which general interest articles incorporate a product being promoted, as well as includes coupons for the promoted products corresponding to these articles.”

As shown in the second Declaration of Caleb J. Pirtle, although the promotional magazine market is mature, Dockery House has been able to obtain a sizable amount of the market offering promotional magazines incorporating the invention of the present claims. Moreover, there is clearly a nexus between this commercial success and the invention of the claims as both the words of Mr. Pirtle in the second Declaration of Caleb J. Pirtle and the supporting customer letters establish that the commercial success is a result of the unique promotional technique recited in the claims. Accordingly, Appellant respectfully asserts that the present claims are not obvious under 35 U.S.C. § 103.

In response to Appellant’s submission of the second Declaration of Caleb J. Pirtle and Supplemental Declaration of Caleb J. Pirtle, the Appellee opines that such are insufficient to overcome the rejection of the claims based upon the 35 U.S.C. § 103 rejections of record because the declarations do not establish a nexus between the claimed invention and the evidence of commercial success. The Appellee supports this position by stating that it is clear from the declarations and the letters that Dockery House is providing more services than just those of the claimed invention, see the Office Action mailed April 25, 2002 at page 6. However, there is no requirement that an applicant for patent provide only a good or service related to an invention in order to prove commercial success.

The M.P.E.P. directs that “[a]n applicant who is asserting commercial success to support its contention of nonobviousness bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success,” M.P.E.P. § 716.03. “The term ‘nexus’ designates a factually and legally sufficient connection between the evidence of commercial success and the claimed invention so that the evidence is of probative value in the determination of nonobviousness,” M.P.E.P. § 716.03 (citing *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 7 U.S.P.Q.2d 1222 (Fed. Cir. 1988)).

Appellee has shown that the commercial success attested to is directly connected to implementation of the inventive technique recited in the claims. For example, the letter from Sally Beauty Company states “[w]e believe the increased coupon redemption rate is a result of the way Dockery House Publishing provides product placement and corresponding coupons in general interest articles [and therefore] Sally will continue to purchase promotional product magazine programs from Dockery House Publishing so we can take advantage of this promotional technique.” Similarly, as discussed above, the letter from Lifestyle Vacation Incentives states that they are moving to the Dockery House promotional magazines “to take advantage of the unique way in which Dockery House Publishing provides a promotional magazine in which general interest articles incorporate a product being promoted, as well as includes coupons for the promoted products corresponding to these articles.” Accordingly, irrespective of what other services Dockery House may or may not provide, it is clear that the commercial success of their promotional magazine programs are directly connected to implementation of the invention of the present application.

Moreover, services that are identified by the Appellee as being in addition to the presently claimed invention are encompassed by the claims. For example, the Appellee points to the statements of Ken Summers in the letter from Consumer Solutions regarding the editorial staff of Dockery House working to tailor original articles and photography to showcase the products. However, claims 20 and 21 expressly recite commissioning of articles by the sponsor of the specific brand or by a specific store.

Although services with respect to determining market trends and demands, and analysis of historic sales performance, sales and marketing growth potential and advertising or marketing budget needs are not expressly recited in the claims, such services are complementary to providing of a promotional magazine as claimed. Accordingly, preferred embodiments of the present invention are described wherein “store 10 communicates its choice of products to be promoted to a promotional organization (not shown) having a staff of research, editorial, photography, and marketing personnel,” see the specification at page 12, lines 3-5. Clearly, it is envisioned that the present invention may be implemented with such complementary services. It is unfair to dismiss evidence of commercial success, wherein a nexus between the claimed invention and the commercial success is shown, simply because such complementary services may be provided.

2. Proper Motivation Under 35 U.S.C. § 103 Has Not Been Established With Respect to the Proffered Combination of *Shedd* and *Bullard*

The Appellee concedes that *Shedd* does not disclose a magazine as recited in the claims. However, Appellee asserts that *Bullard* discloses that, in advertising media, books and magazines are equivalent, see the Office action mailed April 25, 2002 at page 4. It is respectfully asserted that *Bullard* does not disclose that books and magazines are equivalent with respect to advertising media. Instead, *Bullard* teaches that the term booklet as used therein describes “a broad category of advertising media including magazines, books, catalogs, pamphlets, newspapers and the like,” column 2, lines 30-33. There is nothing to suggest that magazines may be generally substituted for books as advertising media by this disclosure and, therefore, it is respectfully asserted that the disclosure does not recognize equivalency as required for the rejection of record under 35 U.S.C. § 103. Accordingly, a *prima facie* case of obviousness has not been established with respect to claim 18 and the claims dependent therefrom.

3. The Rejections Under 35 U.S.C. § 103 Do Not Meet All Elements Of The Claims

In rejecting claims 18, 22, and 25 under 35 U.S.C. § 103(a) over *Shedd* in view of *Bullard*, the Appellee asserts that “[t]he book of *Shedd* includes recipes which are articles of general interest,” the Office Action mailed April 25, 2002 at page 3. However, the proffered recipes do not meet the general interest articles recited in claim 18. To aid the Board and the Appellee in appreciating Appellant’s position, attention is directed toward page 10, line 28, through page 11, line 2, and page 11, lines 20-24, wherein it is taught that brochures include columns presenting a recipe, whereas magazines of the present invention contain full length feature articles which are more extensive than the columns found in the brochures. Accordingly, when read in light of the specification, as directed by M.P.E.P. § 2173.02, it is clear that the recipes of *Shedd* do not meet the present claims.

Moreover, claim 18 recites “at least one of said articles including within its confines specific brand information pertaining to said identified product; and a coupon keyed to said at least one of said articles containing said brand specific information.” The Appellee relies upon the recipes of *Shedd* including a particular product of a distributor to meet this aspect of the claims, see the Office Action mailed April 25, 2002 at pages 3 and 4. However, *Shedd* merely discloses that “the book contain[s] recipes including, among other ingredients, a

particular ingredient, for example, milk, sold by the distributor,” page 2, column 1, lines 21-23. There is no hint or suggestion of the inclusion of brand specific information within the disclosure of *Shedd*. Accordingly, it is respectfully asserted that Appellee has concluded that the requisite brand specific information is shown as a result of hindsight gleaned from Appellant’s own disclosure. Reliance upon such hindsight is improper in forming the basis of a rejection under 35 U.S.C. § 103, see M.P.E.P. §§ 2143.01 and 2145(X)(A).

Accordingly, it is respectfully asserted that claim 18 is patentable over the art of record. Moreover, as the claims depend therefrom add additional elements not present in claim 18, claims 19-23 and 25 are a *fortiori* patentable over the art of record.

B. The Claim of Group 2 (Claim 19)

In rejecting claim 19, the Appellee concedes that *Shedd* and *Bullard* do not disclose a magazine being specific to a particular store, see the Office Action mailed April 25, 2002 at page 4. Accordingly, Appellee relies upon the disclosure of *Lamphere* to meet this aspect of the claims. However, *Lamphere* does not appear to teach a magazine for use in promoting the purchase of specific products. Instead, *Lamphere* teaches a “clutch purse type coupon-holding device,” see column 7, lines 20-21. Accordingly, it is respectfully asserted that a *prima facie* case of obviousness has not been established with respect to claim 19.

C. The Claim of Group 3 (Claim 20)

In rejecting claim 20, the Appellee asserts that “[i]t would have been obvious to one of ordinary skill in the art in view of the disclosure in col. 9, lines 5-12 of *Lamphere* et al. to sell advertising space in the magazine of *Shedd*, as modified by *Bullard*, Jr. to store brands or national brands,” see the Office Action mailed April 25, 2002 at page 5. However, even assuming *arguendo* that the Appellee’s assertion is accurate, the claims are not *prima facie* obvious.

Claim 20 recites “each of said articles which contains specific brand information is authored under commission by a sponsor of the specific brand in said article.” There is nothing in the Appellee’s proffered modification of the applied art to meet the recited article authored under commission by a sponsor of the specific brand. Accordingly, a *prima facie* case of obviousness with respect to claim 20, and the claim dependent therefrom, has not been established.

D. The Claim of Group 4 (Claim 21)

As with claim 20 discussed above, in rejecting claim 21, the Appellee asserts that “[i]t would have been obvious to one of ordinary skill in the art in view of the disclosure in col. 9, lines 5-12 of *Lamphere et al.* to sell advertising space in the magazine of *Shedd*, as modified by *Bullard, Jr.* to store brands or national brands,” see the Office Action mailed April 25, 2002 at page 5. However, even assuming *arguendo* that the Appellee’s assertion is accurate, the claims are not *prima facie* obvious.

Claim 21 recites “each of said articles which contains specific brand information is authored under commission of a specific store.” There is nothing in the Appellee’s proffered modification of the applied art to meet the recited articles authored under commission of a specific store. Accordingly, a *prima facie* case of obviousness with respect to claim 21 has not been established.

E. The Claim of Group 5 (Claim 22)

Claim 22 recites “the name of said specific store appears on a front cover of said magazine.” Appellee has not addressed this aspect of the claims in the 35 U.S.C. § 103 rejection of record, see the Office Action mailed April 25, 2002 at pages 4-5. Accordingly, a *prima facie* case of obviousness has not been established with respect to claim 22.

F. The Claim of Group 6 (Claim 23)

As with claims 20 and 21 discussed above, in rejecting claim 23, the Appellee asserts that “[i]t would have been obvious to one of ordinary skill in the art in view of the disclosure in col. 9, lines 5-12 of *Lamphere et al.* to sell advertising space in the magazine of *Shedd*, as modified by *Bullard, Jr.* to store brands or national brands,” see the Office Action mailed April 25, 2002 at page 5. However, even assuming *arguendo* that the Appellee’s assertion is accurate, the claims are not *prima facie* obvious.

Claim 23, in addition to reciting the article authored under commission by a sponsor of the specific brand as provided by claim 20, recites “the content of each of said articles which contains specific brand information is controlled at least in part by a sponsor of the specific brand in said article.” There is nothing in the Appellee’s proffered modification of the applied art to meet the recited content of the articles controlled by a sponsor of the

specific brand. Accordingly, a *prima facie* case of obviousness with respect to claim 23 has not been established.

G. The Claim of Group 7 (Claim 25)

Claim 25 recites "at least one of said articles includes within its confines reference to specific brand information pertaining to products other than said identified product." Appellee has not addressed this aspect of the claims in the 35 U.S.C. § 103 rejection of record, see the Office Action mailed April 25, 2002 at pages 4-5. Accordingly, a *prima facie* case of obviousness has not been established with respect to claim 25.

IX. CLAIMS INVOLVED IN THE APPEAL

A copy of the claims involved in the present appeal are attached hereto as Appendix A.

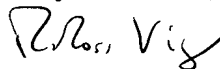
X. CONCLUSION

For the extensive reasons advanced above, Appellant respectfully contends that none of claims 18-23 and 25 are obvious under 35 U.S.C. § 103 over the applied art. Therefore, affirmation of this position is courteously solicited.

Date: August 15, 2002

Respectfully submitted,

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APPENDIX A

Claims Involved in the Appeal of Application Serial No. 08/813,852

18. A magazine for use in promoting the purchase of specific products, said magazine comprising:

a plurality of general interest articles dispersed throughout the magazine;
at least one of said articles making reference to an identified product, said at least one of said articles including within its confines specific brand information pertaining to said identified product; and
a coupon keyed to said at least one of said articles containing said brand specific information.

19. The magazine as set forth in claim 18 wherein said magazine is specific to a particular store.

20. The magazine as set forth in claim 18 wherein each of said articles which contains specific brand information is authored under commission by a sponsor of the specific brand in said article.

21. The magazine as set forth in claim 18 wherein each of said articles which contains specific brand information is authored under commission of a specific store.

22. The magazine as set forth in claim 21 wherein the name of said specific store appears on a front cover of said magazine.

23. The magazine as set forth in claim 20 wherein the content of each of said articles which contains specific brand information is controlled at least in part by a sponsor of the specific brand in said article.

25. The magazine as set forth in claim 18 wherein said at least one of said articles includes within its confines reference to specific brand information pertaining to products other than said identified product.